To sum up, if a prior possession proved is sufficient title to recover from a trespasser or intruder who shows no title at all, then, it is submitted that a prior possession proved, coupled with as good a title shown as that adduced by defendant who ousted plaintiff, should logically entitle plaintiff to recover. So that in such case defendant must show a better title to successfully resist him or, in other words, in such cases at least there is an exception to the general rule and the defendant has the burden of showing the better title, as well as of making out his title by affirmative proof of its essential elements, which we claim he must always do after plaintiff has shown a prima facie good title.

J. F. M.

BROWN v. AUSTIN WESTERN CO., Limited.

March 10, 1910.

[68 S. E. 184.]

1. Sales (§ 168½*)—Sale on Approval.—Where there is a sale on trial, it is not complete until the approval, and the failure to return the property within the time specified for trial, or within a reasonable time, renders the sale complete.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

2. Sales (§ 168½*)—Sale on Approval—Rights of Purchaser.—An order for stone crushers of a specified capacity provided that, on their arrival, defendant would furnish power, cartage, and assistance to give them a fair trial; that, if they equaled the stipulated capacity, defendant would pay the price, if not he would notify plaintiff, and, if plaintiff failed to make the crushers do the prescribed work within 30 days, plaintiff would receive them back. Held that, on plaintiff's failure to make the crushers do the amount of work contracted for, defendant could not demand payment for the expense of the permanent foundations constructed by him for the crushers, as a condition precedent to his returning them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168 ½.*]

3. Sales (§ 168½*)—Sale on Approval—Breach of Contract by Purchaser.—Where the purchaser of a machine on approval refused to return the same after it had failed on the trial to work according to contract, the sale became absolute, and he was liable for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

4. Sales (§ 288*)—Warranty—Waiver.—Where the purchaser kept machines purchased on approval, after trying them, he thereby waived any warranty as to capacity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

Error to Law and Equity Court of City of Richmond.

Action by the Austin Western Company, Limited, against J. Henry Brown. Plaintiff had judgment, and defendant brings error. Affirmed.

Ro. H. Talley, for plaintiff in error.
H. St. John Coalter, for defendant in error.

HARRISON, J. This action of assumpsit was brought by the Austin Western Company, Limited, to recover of J. Henry Brown $2,249, the purchase price of two rock crushers. The defendant filed a plea of nonassumpsit, and a special plea of set-offs, amounting to $5,121.60. There was a verdict and judgment in favor of the plaintiff for $2,249 and costs, subject to a credit of $221.60, which we are asked to review and reverse.

It appears that the defendant, J. Henry Brown, owned and operated certain granite quarries in Henrico county, and that the plaintiff manufactured machinery in Chicago. On the 6th day of July, 1906, the defendant placed in the hands of the plaintiff an order for two stone crushers and all necessary driving connections, to be shipped to Richmond, Va. This order was in form a written contract signed by the defendant, which set forth in detail the terms of purchase agreed upon between the parties. It provided that crusher No. 2 should have the capacity of turning out from 18 to 30 tons per hour, and that No. 3 should turn out from 30 to 40 tons per hour; that, upon the arrival of the crushers, the defendant would pay the freight charges, and at his own expense furnish power, cartage, assistance, etc., to give the crushers a fair and thorough trial. It provided further, that, if the crushers should equal the stipulated capacity, the defendant would pay for them according to the terms of the contract, but that, if they did not, he would notify the plaintiff in writing at Chicago of such failure, and that, if within 30 days from the receipt of such notice the plaintiff failed to make the crushers do the prescribed work, then the plaintiff would refund the freight charges and receive back the crushers at the Richmond railroad station from which they had been taken, and would cancel the contract. The crushers

*For other cases see same topic and section NUMBER in Dec. & Am. Diges. 1907 to late & Reporter Indexes.

are warranted to be thoroughly made of good material and workmanship, capable of doing the work for which they were intended, without breakage, the plaintiff agreeing to replace, free of charge, any parts which may break within 12 months from the date of the contract through fault of material or construction. Finally, it is agreed that the contract embodies the entire understanding, that it is not subject to countermand, and is not to be affected by any verbal agreements.

In pursuance of this contract the plaintiff delivered at the Richmond railroad station two stone crushers Nos. 2 and 3, which were received by the defendant and removed by him to his granite quarries, having first paid the freight charges as stipulated. The contract provided that the defendant should, at his own expense, furnish the power, cartage, assistance, etc., necessary to give the crushers a fair and thorough trial, and the evidence abundantly shows that the contemplated test could have been made at a cost of from $25 to $35. The defendant, however, before making any test, proceeded to build heavy concrete foundations and other equipment for a permanent plant at a total cost, as alleged, of $2,121.60. After this expensive plant was completed, the defendant placed the crushers in position for permanent use, and then, for the first time, subjected them to any test. The only reason given by him for pursuing this course was that the agent from whom he bought was a friend of his, in whom he had great confidence, and that he did not doubt that his representations with respect to the capacity of the machines was true. When the crushers were finally subjected to trial, the defendant found that they fell very far short of the capacity called for by the contract, and he notified the plaintiff of that fact. There was considerable delay and correspondence about the matter; it being suggested by the plaintiff that the diminished capacity was the result of lack of power in operating the machines. Finally, the plaintiff wrote to the defendant, calling his attention to the clause in the contract giving him the right to return the machines to the Richmond railroad station and to be reimbursed the freight charges paid by him, and insisting that he should, without further delay, decide whether he would keep the machines or return them, and be reimbursed the freight charges which were tendered. The defendant refused to return the crushers, which he had been in the meantime using, unless the plaintiff would agree to pay him the damages he claimed to have suffered as a result of the transaction. These are stated in the special plea of set-offs to be $2,121.60, the cost of the permanent structure and its equipment, and $3,000 cost of removing and storing waste stone from the quarry after he was ordered to stop using the crushers.

Throughout this case the contention on behalf of the de-

fendant has assumed that the contract under consideration evidenced an absolute sale; that the title passed at once upon the delivery of the crushers, with a warranty that they would do a certain amount of work. This position is not tenable. The contract evidences what is termed a "sale on trial." Where there is a sale on trial, there is no sale until the approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial, which is a reasonable time if not expressly fixed; and the failure to return the goods within the time specified for trial or within a reasonable time makes the sale absolute. Benjamin on Sales (2d Am. Ed.) § 595; 2 Schouler's Personal Property, pp. 309, 310; Machine Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57.

In the case at bar, the contract, which was filled up in large part by the defendant, furnishes no warrant for the position taken that he could demand payment of the damages claimed in his plea of set-offs as a condition precedent to his returning the machines. The extent of the defendant's right under his contract was to subject the machines to trial at his own cost, and, if they did not equal a certain capacity, to return them to the railroad station at Richmond, and have the freight charges paid by him refunded. This the defendant refused to do, and therefore the sale became absolute, and he became liable to pay the plaintiff the purchase price.

It is by no means clear that the warranty clause in the contract was intended to cover the capacity of the crushers, but, if it was so intended, the title would have to pass before such a warranty could become effective. Bunday *v.* Machine Company, 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475. Under the contract before us, the title to the stone crushers never passed until the defendant had tried them and refused to return them. If he kept them after trying them, he thereby waived any warranty express or implied.

The instructions given by the court were in conformity with the view herein taken of the contract, and properly submitted the case to the jury. The instructions asked for by the defendant were wholly in conflict with the principles herein announced, and were properly refused.

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

NOTE.

Goods or chattels are sometimes taken on trial with an option to purchase. An option to purchase in such case is essentially different from a sale where the property is sold with an option to return the

purchase. In "sales on trial" the condition is precedent and the title to the goods does not pass to the buyer until he has accepted them in accordance with the provisions of the contract, whereas in contracts of "sale or return," the act of returning the goods is a condition subsequent, and the title vests immediately. Pitts Sons Mfg. Co. *v.* Poor, 7 Ill. App. 24; Mowbray *v.* Cady, 40 Iowa 604; Kahn *v.* Klabunde, 50 Wis. 238.

But in either case the buyer may return peremptorily within the time without giving any reason, if he acts honestly. Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859.

Thus, goods left on trial under an agreement that if they prove satisfactory they shall be paid by note due on a certain day or by cash that day, remain the seller's and at his risk until such date, if not accepted before. Pierce *v.* Cooley, 56 Mich. 552.

The condition that property taken on trial may be returned if it does not prove satisfactory must be fully performed and the buyer satisfied. If the contract permits the buyer to decide himself whether the articles furnished are to his satisfaction, it is not for any one else to decide whether a refusal to accept is or is not reasonable. Silby Mfg. Co. *v.* Chico, 24 Fed. Rep. 893; Hallidie *v.* Sutter St. R. Co., 63 Cal. 575; Zaleski *v.* Clark, 44 Conn. 218, 26 Am. Rep. 446; Goodrich *v.* Van Nortwick, 43 Ill. 445; Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 436; McCarren *v.* McNulty, 7 Gray (Mass.) 139; Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 565, 45 Am. Rep. 57; Pierce *v.* Cooley, 56 Mich. 552; Gibson *v.* Crahage, 39 Mich. 49, 33 Am. Rep. 351; Hoffman *v.* Gallaher, 6 Daly (N. Y.) 42; Grant *v.* Burch, 26 Hun. (N. Y.) 376; Heron *v.* Davis, 3 Bosw. (N. Y.) 336; Gray *v.* Central R. Co., 11 Hun. (N. Y.) 70; Dustan *v.* McAndrew, 44 N. Y. 72; McCormic Harvesting Mach. Co. *v.* Chesbrown, 33 Minn. 32; McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 57 Am. Rep. 257.

Thus plaintiff, a sculptor, made a plaster bust of the deceased husband of the defendant under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed, it was found that the bust was a fine piece of work, the correct copy of a photograph furnished by a defendant, and that it accurately portrayed the features of its subject, and that the only fault found with it was that it did not have the expression of the deceased when alive, which was caused by no imperfection in the work but by the nature of the material. Held, that as the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable. Zaleski *v.* Clark, 44 Conn. 218, 26 Am. Rep. 446.

One who buys a harvesting machine called a "binder" upon the condition that if it does not work to his satisfaction, he may return it, has an absolute right to reject the machine, if he so wills, without assigning any reasons. Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. Rep. 859.

But where a contract may be construed as binding the buyer to decide on fair and reasonable grounds, it seems that the dissatisfaction must be real in order to relieve the buyer from liability. In one case his decision cannot be reviewed, but it can be in the other. Robinson *v.* Bennett, 50 Mich. 565. See Daggett *v.* Johnson, 49 Vt. 345; Hartford Sorgum Mfg. Co. *v.* Brush, 43 Vt. 528; McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557; Manny *v.* Glendinning, 15 Wis. 50.

In other words, the buyer in such cases must act honestly, and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject matter and surrounding circumstances. His dissatisfaction must be actual, not feigned; real, not merely pretended. Note to Osborne *v.* Francis, 38 W. Va. 312, 45 Am. & St. Rep. 859.

If the property does not prove satisfactory to the buyer after trial, he must return it to the seller or give notice of his dissatisfaction with it in order that he may be fully protected from liability for the price. Aultman *v.* Theirer, 34 Iowa 272; McCormick *v.* Basal, 50 Iowa 523; Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, 18 Am. Rep. 621; Johnson *v.* McLane, 7 Blackf. (Ind.) 501; Furneaux *v.* Esterly, 36 Kan. 539, 43 Am. Dec. 102; Spickler *v.* March, 36 Md. 222; Aiken *v.* Hide, 99 Mass. 183; Paulson *v.* Osbourne, 35 Minn. 90; Fisher *v.* Merwin, 1 Daly (N. Y.) 234; Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Fairfield *v.* Madison Mfg. Co., 38 Wis. 348; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 57 Am. Rep. 257.

If he fails to do this, the rule as announced in the principal case is well settled that the sale becomes absolute and the buyer becomes liable for the price. 6 Am. & Eng. Enc. of Law, 2nd Ed., 465; House *v.* Beak, 141 Ill. 290, 33 Am. St. Rep. 307.

Thus, where a machine is sold on a conditional warranty providing for testing within a certain time and for notice, if the purchaser would avail himself of the warranty he must render substantial compliance with the agreement. Furneaux *v.* Esterly, 36 Kan. 539.

Where the contract allows the buyer a fixed time for testing the article sold, he is entitled to the full time specified. Cole *v.* Common Council, 53 Mich. 438. See Argensinger *v.* Cline, 69 Iowa 57.

For example, a reaping machine was sold with leave to test it by using it for a day. Held, that using it from two o'clock p. m. was not for a day, the rule that courts take no notice of fractions of a day having no application. Fuller *v.* Schroeber, 20 Neb. 631.

So, also, where the test cannot be made within the time specified; as, for example, in the case of a furnace because there is no cold weather, the test is seasonably made if made afterwards. Richardson *v.* Hampton Independent Dist., 70 Iowa 573.

If no time is fixed within which notice of the approval is to be given, the notice must be within a reasonable time. Hickman *v.* Shimp, 109 Pa. St. 16; Davey *v.* Erie, 14 Pa. St. 211.

Unless there is a stipulation which relieves the buyer from such an obligation. Smalley *v.* Hendrickson, 29 N. J. L. 371; Gibson *v.* Vail, 53 Vt. 476.

Thus, where a horse is sold conditionally, to be returned in the event the buyer should be dissatisfied with him on trial, the sale will become absolute by the buyer's keeping the horse beyond a reasonable time. Quinn *v.* Stout, 31 Mo. 160.

And where a cotton gin was sold in the spring of the year, upon condition that it should perform to the satisfaction of the purchaser when tried, there being no evidence to the contrary, it was held that the trial contemplated was to be after the commencement of the next cotton picking, and that notice given in October, by the purchaser, that he would not keep the gin, was in time. Hall *v.* Meriwether, 19 Tex. 224.

The question as to what is a reasonable time is for the jury. Bretty *v.* Scales, 27 Wis. 626.

Fifteen years held to far exceed the reasonable time allowed a purchaser to accept an optional contract. Cooper *v.* Carlisle, 17 N. J. Eq. 525.

If the seller refuses to receive the property, the buyer may retain it and recoup the damages for the defect from the amount of recovery in an action by the seller for the price. Aultman *v.* Thierer, 34 Iowa 272.

Any loss or damage suffered to the property during the trial will fall on the seller. Hunt *v.* Wyman, 100 Mass. 198.

But if, by negligence of the prospective buyer, the value of the goods has been materially impaired, the seller may recover damages. Moss *v.* Sweet, 16 Q. B. N. S. 493.

And the buyer's right of rejection of the goods will be lost. Ray *v.* Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187.

If the nature of the property is such that some of it must be consumed in order that a trial may be made, the sale will become absolute and the buyer will be liable for the price if he consumes more than is necessary in the trial of the goods. See Lucy *v.* Mouflet, 5 H. & N. 229; Okell *v.* Smith, 1 Stark. 107; Elliott *v.* Thomas, 3 M. & W. 170.